

EMPTY JUDGMENTS

The Wage Collection Crisis in New York

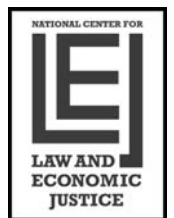


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SECTION 01 / NEW YORK'S WAGE COLLECTION CRISIS: EMPLOYERS AVOID PAYING MILLIONS OF DOLLARS IN WAGE THEFT JUDGMENTS

***“[The workers]
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// Jin Ming Cao, former
employee of Wu Liang Ye
Restaurant.

Across all low-wage industries, employers regularly fail to pay workers the wages required by law.¹ However, despite increased efforts to combat rampant wage theft, New York law fails to hold employers accountable. Even when workers take an employer to court and win, employers often avoid paying what they owe. In the months or years it takes to get a court judgment, employers transfer money from their bank accounts, put property in the names of family members, close down their business or change its name, create sham corporations, ignore court orders, or leave the country with their property. Unlike other states, New York law does not provide adequate protection against these tactics. As a result, many workers never get paid the wages they earned, even when they engage in a lengthy legal process.

This report is a snapshot of this wage collection crisis in New York. We explain why New York law fails to stop evasive employers from paying their workers, and we share the stories of workers affected by this failure. From 17 legal service organizations and employment attorneys who represent low-wage workers, we identified 62 recent New York federal and state court wage theft judgments that employers have not paid.² These 62 cases collectively represented a total of over \$25 million owed to 284 workers.³ New York law was of no assistance: the employers in these cases successfully avoided paying the wages ordered by the courts.

Out of these 62 cases, 69% were default judgments (43 cases). This is not surprising: the most evasive employers simply refuse to participate in the legal system, leaving workers who seek to enforce their rights with only a piece of paper declaring how much they are owed.

These unpaid judgments only scratch the surface of this crisis. Attorneys who represent the low-wage workers most commonly victimized by wage theft report that the majority of cases are resolved for far less than is actually owed due to the fear that a judgment for the full amount owed will never be paid. Many workers and lawyers do not even bring claims in the first place because collection seems so unlikely. Of the industries represented in the 62 cases, the restaurant and construction industries ranked highest in avoiding the payment of judgments: 26% of the cases (16 cases) were from the restaurant industry and 34% (20 cases) were from the construction industry. But employers' evasion of judgments occurred across all low-wage industries, including domestic work, garment factories, nail salons, and grocery stores.

The problem is not limited to civil litigation. Documents obtained from the New York State Department of Labor (DOL) show that the DOL was not able to collect over \$101 million in wages the agency had determined employers owed to workers over a 10-year period (from 2003 to 2013).⁴ The lowest wage workers are particularly hard hit: 74% of the amount of wages DOL determined to be owed to workers were based on minimum wage violations.⁵

In sum, our research identified at least \$125 million in empty judgments and orders, providing a glimpse into the scope of the wage collection problem in New York. Our analysis of the law and the stories of affected workers show that New York law must be amended to stop this crisis.

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**This report
identifies three
necessary
changes to New
York law that will
strengthen the
ability of workers
to collect their
hard-earned
wages before the
employers' assets
disappear:**

01 / Expand New York's mechanic's lien law to include all workers, not simply those working to improve real property;

02 / Change the standard in civil procedure law to allow workers who demonstrate a likelihood of success on their wage theft claims to obtain court-supervised attachment of an employer's property prior to the resolution of the case; and

03 / Amend the law to remove unnecessary barriers that make it difficult for workers to collect wage judgments from the top shareholders of privately held corporations and top members of limited liability companies.

SECTION 02 / LIMITATIONS IN CURRENT NEW YORK LAW: HOW NEW YORK LAW FAILS WORKERS AND EVASIVE EMPLOYERS WIN

// A “lien” allows someone who is owed a debt to record the debt in the property records of the person that owes the debt. The lien does not automatically transfer title of the property to the person owed money or prohibit its sale. A lien puts any potential buyer on notice that if the amount is not paid, the lienholder could eventually obtain payment through a court action called foreclosure.

New York law currently fails to ensure that workers who win wage claims will be able to collect the money they are owed from their employers.

02.01 / NEW YORK’S LIEN LAW FAILS TO PROTECT WORKERS FROM WAGE THEFT

Since 1909, New York has had a lien law that permits certain workers in the construction industry to file a “mechanic’s lien” on the specific property on which they worked if they are not paid in full.⁶ However, the remedy as it is used today is too limited to help even most construction workers. The current law only permits workers to put a lien on the property if the owner of the property has not paid the workers or the contractor.⁷ Since most construction workers today are employed by contractors—and not the property owners themselves—this remedy does nothing for these workers, as well as workers in other industries where wage theft is also a common practice.

However, New York’s existing mechanic’s lien shows there is a basis in New York law to use liens to enforce wage claims. Ten other states allow a spectrum of workers to put a lien on an employer’s property in connection with a wage claim. Using the existing mechanisms, New York’s lien law could be expanded to help stem wage theft across all industries. Allowing all workers with meritorious wage claims to put a temporary lien—usually called a “wage lien”—on their employers’ property would bring New York in line with other states that have enacted wage liens to provide better protections for their workers.

An expanded wage lien would be particularly helpful for workers whose employers refuse to participate in the legal process. When an employer fails to show up in court after a worker brings a case, workers can get a default judgment but must then spend time hunting down the employer and his assets in order to collect and enforce the judgment. Employers who default and never pay the workers in accordance with the court order force workers to exhaust their resources in pursuit of their claims. A wage lien not only encourages an employer to dispute the matter and play fair in court, but ensures that if the workers win their case, they may actually be able to enforce a judgment against the employers' property and collect the wages they are owed.

// A “wage lien” would allow all workers the right to put a temporary lien on an employer’s property when they have meritorious claims for wage theft.

EXAMPLES

Two cases where a wage lien could have made the difference.

// A wage lien gives an employer greater incentive to appear in court. Two workers explain how, with no wage lien in place, they were not able to collect after winning in court by default.

Raimundo Calderon,⁸ a devoted father, was justifiably upset when the real estate company employing him for construction work failed to pay him a week's worth of wages: "I did this work during Christmas time hoping to earn money to buy gifts for my family and more importantly to pay for the most basic necessities—things we need to survive." Worse, the company locked him out of the worksite without advance notice, leaving him unable to retrieve his tools and effectively stealing them from him. Regrettably, this happens all too often to workers like Raimundo. He estimates bringing at least five other incidents of wage theft to small claims court or the DOL, saying, "While sometimes I am demoralized, I think it is important to stand up to employers who break the law.... These employers are stealing bread from my children and many families."

Unfortunately, sometimes there is no employer to "stand up to." When Raimundo pursued his claims against the real estate company, the employer did not bother showing up in court. Raimundo won a default judgment but was never paid any of the money that he was owed.

After Hurricane Sandy, Santiago Torres⁹ worked gutting and rebuilding damaged houses for only \$150 a day, and no overtime. The construction company that employed him stopped paying him for his work, however, and Santiago took his employer to small claims court after the company owed him more than \$2,000.

It took about six months to get a hearing, and as Santiago recalls, "It was frustrating because we put in about 10 to 15 hours of work preparing [for the hearing] but the employer never came." Despite winning the case against his employer, the employer has thus far evaded collection, leaving Santiago distrustful of the current laws in place: "I feel like the fact that a judge ruled in my favor means nothing. I used to think courts had power but now I'm not sure."

“I feel like the fact that a judge ruled in my favor means nothing. I used to think the courts had power but now I’m not sure.”

// Santiago Torres, construction worker.

EXAMPLES

Employers' Bankruptcy Filing Halts Workers' Case in Court: Sanchez v. Best Boat Seafood Restaurant ¹⁰

In 2011, five workers from a restaurant known as Charm Thai, located in Manhattan, filed suit in federal court in New York alleging minimum wage and overtime violations, and unlawful retaliation after they complained of the violations. The court granted a default judgment against the two individual owners for \$830,000. The owners, husband and wife, managed to avoid responsibility for their violations by closing the several restaurants they owned and filing for bankruptcy protection. The bankruptcy filing served the purpose of halting the district court case against them and gave the owners time to gather their assets and leave the country. The bankruptcy court ultimately threw the case out because the owners disappeared and failed to cooperate in their own proceeding, but not before 15 months had elapsed and the owners were long gone. Their whereabouts are unknown and they have not paid a penny of the judgment to the workers.

Restaurant Closes in Response to DOL Fine and Avoids Collection: Green Café ¹¹

At Green Café in Ithaca, New York, bussers, dishwashers, and other workers were repeatedly denied wages and regular days off. The DOL found the owner owed \$623,000 for violations at his Ithaca location and \$377,000 for his New York City deli. Shortly after, Green Café shut its doors. The DOL has not been able to collect any money and the workers have not been paid.



Employer Interferes with DOL Investigation to Cause Delay, Then Closes Down and Claims He Cannot Pay DOL Order of Over \$1.45 Million: La Posada Restaurant¹²

In January 2009, with the help of a community organization, a group of waitresses from La Posada Restaurant, Gaviota's Restaurant and Sports Bar, and Tequila Song, three co-owned restaurants in Manhattan, spoke with the DOL to report extreme wage violations. After receiving the workers' complaint, the DOL initiated an investigation and the employer provided payroll records. However, the workers advised DOL that the primary employer, Angel Moina, had directed the workers to sign fabricated payroll records and told them to lie to investigators. Relying on the workers' testimony instead of the employers' fraudulent records, the DOL issued orders to comply directing the payment of over \$1.45 million in wages and penalties. One of the employers agreed to pay a small portion and the other two appealed. After a hearing in April 2012, the Industrial Board of Appeals upheld the majority of the DOL's order, but the employers appealed once more. In the meantime, Mr. Moina dissolved the corporation doing business as La Posada Restaurant and his restaurant now operates under a different name. While the appeal was pending, the New York Attorney General's office issued a felony criminal complaint against Angel Moina and La Posada Restaurant Inc. for false tax filings. Mr. Moina entered a plea and paid a small fraction of what he owed to the workers, claiming he had no other funds.

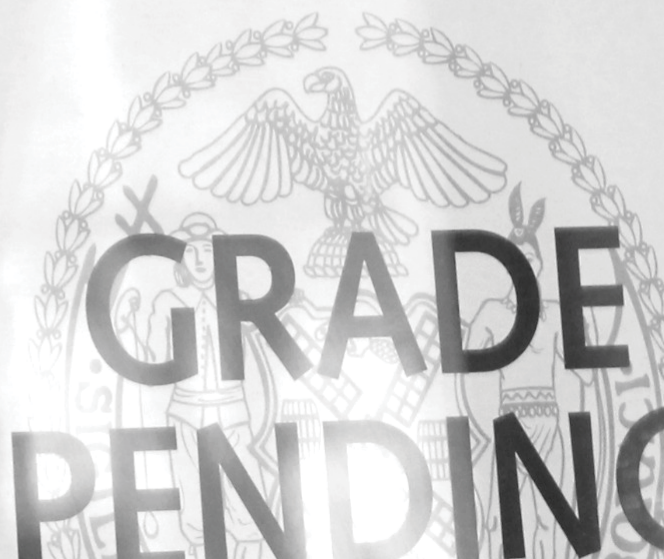
Saigon Grill Restaurant Closes: Default Judgment¹³

Four months after three workers filed a lawsuit in federal court against the new owners of Saigon Grill Restaurant in Manhattan's Upper West Side, the owners shut down the restaurant and never showed their face in court. In May 2013, the court awarded the workers close to \$181,000 in a default judgment for the defendants' labor law violations. Collection efforts thus far have been unsuccessful and the workers are now in bankruptcy court against the largest shareholder who reported in his bankruptcy filings that he owned 80% of the corporation, yet has also denied having any actual financial investment in the company.

Notice:
Restaurant
official Closed.
We're sorry for
inconvenience
with you.

Saigon Grill Management 02-26-13

SANITARY INSPECTION GRADE





Construction workers, along with other members of New Immigrant Community Empowerment (NICE), protest outside their former employer's home for failing to pay their wages.

Employers Shut Down Business and Ignore Lawsuit: Alvarez v. Well-S Industrial, Inc.¹⁴

In 2012, a group of eight construction workers filed a federal lawsuit against their employers for their unpaid wages for the construction work they performed at an elite private school in Manhattan. The construction company and its principal owner ignored the lawsuit and the workers are currently awaiting the judge's decision on the amount of damages they are owed by the defaulting defendants. One of the defendants who did appear in court claimed that the corporation was defunct and that the workers would have to chase down the assets of the owner in attempt to collect on an eventual judgment.

MARYLAND & WISCONSIN WAGE LIENS IN ACTION

// Ten states have wage liens of varying kinds¹⁵ and other states are considering wage lien legislation,¹⁶ to either improve, update, or add to current law. The impact of these efforts in Maryland and Wisconsin highlight the need for such legislation in New York.

MARYLAND

In Maryland, an employee may record a lien for unpaid wages against an employer's property if the employer does not contest the employee's written notice of lien within 30 days after service, or if the circuit court issues an order to establish a lien.¹⁷

Since going into effect in late 2013, the Maryland Department of Labor, Licensing and Regulation (DLLR) has published template forms online to assist both workers and employers in the lien process.¹⁸

Advocates in Maryland report that the availability of the lien has enabled more representation of individual low-wage workers who would otherwise have difficulty finding an attorney, especially for smaller amounts of unpaid wages.¹⁹ Attorney Camilla Roberson of Baltimore's Public Justice Center notes that the lien is good for legitimate businesses: "We're filing liens against the employers who are really at the bottom of the barrel."²⁰



WISCONSIN

Wisconsin's wage lien law²¹ is one of the oldest and most extensive in the country.²² Passed in 1993, the law applies to all employees and is designed to ensure collection of wage claims.²³ Employees, or the Wisconsin Department of Workforce Development (DWD), may file liens on employers' real and personal property for the full amount of any wage claim if a wage claim has been filed, even if a final determination has not been made.²⁴ The lien becomes effective on the employer's property once the agency or the worker files the notice, pays the fee to the clerk and serves a copy of the petition on the employer.²⁵ This limits the employer's ability to transfer assets while a case is ongoing.

Notably, Wisconsin's wage lien provision is not used very frequently because workers have very high collection rates there.²⁶ A 2013 study by the National Employment Law Project and the UCLA Labor Center found that Wisconsin had

much higher rates of collection for wage theft than California.²⁷ According to the authors' analysis, of the roughly 3,300 claims for unpaid wages filed each year with Wisconsin's DWD, approximately 95% of claims were settled, dismissed or paid in full from 2007 to 2012.²⁸ Between 2005 and 2013, the DWD filed liens in 234 wage theft cases, brought suit to enforce wage liens in 98 of those cases and successfully recovered some payment in about 80% of those cases.²⁹ This 80% figure is particularly significant given the fact that DWD generally brings suit in those cases where the risk of employer default, closing or bankruptcy is highest. In contrast, in California—a state with no wage lien provisions—only 17% of the workers who prevailed before the Division of Labor Standards Enforcement and received a judgment were able to collect any payment at all.³⁰



02.02 / **NEW YORK LAW FAILS TO PRESERVE AN EMPLOYERS' ASSETS DURING LITIGATION**

New York Civil Procedure Law allows a plaintiff to ask a court to hold or “attach” a defendant’s assets at the beginning of a case but the requirements are extremely difficult to meet.³¹ In practice, the “attachment” law is not an effective tool for workers seeking to stop employers from transferring funds or property to avoid paying eventual judgments.

Currently, a court can order an employer to hold assets only when a worker can prove that an employer has acted, or is about to act, with “fraudulent intent” to avoid a potential judgment.³³ Finding evidence to prove an employer’s intent to transfer or encumber its property is extremely difficult, particularly for low-wage workers who often work for businesses that pay bills and wages in cash, operate “off the books” or without clear accounting records, and do not comply with their obligations to produce business records in litigation. Even when presented with clear evidence of rapidly depleted bank accounts and suspicious transfers of property, as the workers’ stories show, courts generally avoid finding an intent to defraud and instead attribute possible non-fraudulent motives to explain the transfers of assets.

In contrast, Connecticut law allows for a pre-judgment attachment of assets if a plaintiff can show at a court hearing that she is likely to succeed in her claims.³⁴ A worker can ask for an attachment of assets even if the employer has not made any indication that they intend to transfer assets to evade collection of a judgment. In Connecticut, workers with meritorious wage claims have a mechanism to ensure that workers who win their wage claims are able to enforce their judgment and actually collect the wages they earned.

// Attachment is a procedure used in litigation that allows the plaintiff to hold or “attach” the defendant’s assets at any time during the case before there is a judgment. Similar to a lien, it does not automatically transfer the title of the property or prevent the sale of property. A property that has been attached is usually held by the county sheriff, or in the case of real property, an attachment is registered with the county clerk. Current state and federal laws provide various protections for individuals who owe money on judgments: all those same protections apply in the case of attachment.³²

EXAMPLES

Motion for Attachment of Assets Could Not Stop Employers' Fraudulent Transfers: Babi Nails Salon³⁵

Yan Zhang, Sam Song, and four of their co-workers sued their former employer, Babi Nails—a chain of three salons on Long Island—for wage theft in December 2009. On June 26, 2012, after a jury trial, the federal district court entered a judgment of over \$474,000 against Babi Nails and its owners for their willful failure to pay minimum wage and overtime as well as retaliatory firing of the workers after the case was filed.

Upon being served with the complaint, the defendants stated their intention to declare bankruptcy and sell the largest of the three salons, as well as put their million-dollar home in Nassau County up for sale.

The workers asked the court to attach the defendants' assets in an amount that could satisfy a potential judgment. At a hearing on the workers' request for attachment, the plaintiffs also introduced bank records showing that while defendants had roughly \$400,000 in their bank accounts when the lawsuit was filed, virtually all of it was transferred or withdrawn within a year of the lawsuit being filed. The court found that the workers were likely to win their wage claim, but denied the attachment motion. Noting the "stringent burden" of proving "fraudulent intent," the court found that "such depletion [of cash] may also reflect a downturn in the economy, as well as the need to pay counsel," even though the defendants produced no documentary evidence to support such a conclusion.³⁶

Sam Song explained that the workers also took action to try to stop the employer from dissipating his assets: "We started a picket at the nail salon to demand [the employer to] stop transferring assets and pay the workers now. [Even though the boss claimed he no longer owned the salon,] we went to . . . the nail salons and found out that [our former employer]



was still there.” The workers reported this to the Court, but before long, “everything was gone from the nail salon.”

After the court’s decision, the defendants continued to hide the rest of their assets. Just days before the trial, they sold a \$2 million commercial property, sold their home on Long Island for \$1.13 million, and gave a mortgage of \$145,000 against another commercial property to a family member. Soon thereafter, one of the three nail salons was sold to a relative for a mere \$10,000. With no judgment yet entered, the workers could only sit and watch this happen.

By the time the judgment of almost half a million dollars was finally entered in 2012, the defendants pleaded poverty. While funds were somehow available for them to continue traveling internationally and driving luxury cars, not a cent was paid to the workers. Indeed, after two years of aggressively pursuing any assets the defendants once had or might still have, only \$110,000 has been collected to date: \$60,000 was obtained by placing a lien on a commercial property that the defendants were unable to sell while the litigation was pending and \$50,000 from successors who agreed to settle once their bank accounts were frozen. In sum, despite filing a lawsuit back in 2009 when the defendants had millions of dollars in assets, and even winning their case, these workers remain unable to collect the wages they earned through hours of laboring in those nail salons.

Yan Zhang concludes: “We won this case and we got a judgment but it does not mean victory because until now, the boss still has not complied with the law. The first thing they did was to fire all of us. Then they transferred assets—they transferred the company and properties into their family member’s name. They closed down the nail salon and reopened using their son’s name. If workers win the case, they should be able to collect their money.”



Wu Liang Ye Restaurant Re-opens in Another Location to Avoid Paying \$1.8 Million Judgment³⁷

Jin Ming Cao worked as a waiter at Wu Liang Ye, a Chinese restaurant in midtown Manhattan. “I worked 66 to 70 hours a week. The restaurant paid me \$300 a month in cash.” The owners also took 10% of his tips. When he and 25 of his co-workers filed a lawsuit to obtain the wages they were owed, their total claim came to almost \$2 million. Their lawyer estimated Jin Ming’s owed wages to be \$140,000 alone.

However, once the workers brought a lawsuit, the owners of the restaurant shut down their restaurant and opened another nearby that was staffed with many of the same workers.³⁸ A few weeks later, their original restaurant re-opened, but under a different name. Jin Ming explained the effect of this on the lawsuit: “[The workers] got a judgment in court for \$1.8 million but we haven’t collected a penny. It’s only a piece of paper.”

“It was so obvious that it was the same owners. They didn’t even bother to change the restaurant decor or menu but our lawyers said there is nothing we can do with the current laws.” These evasive tactics allowed the employers to dodge responsibility for their workplace violations by presenting themselves as having no assets. To prevent this from happening to other workers, Jin Ming would like to see a change in the law that would make it difficult for employers to fraudulently transfer property while a case is pending in court. “We should be able to freeze their assets and property when we first file the claim, not wait until we get a judgment because by then, they’ve already transferred everything.”

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// Jin Ming Cao, former employee of Wu Liang Ye Restaurant.

“We won this case and we got a judgment but it does not mean victory because until now, the boss still has not complied with the law. . . . [T]hey transferred the company and properties into their family member’s name. They closed down the nail salon and reopened using their son’s name. If workers win the case, they should be able to collect their money.”

// Yan Zhang, former employee of Babi Nails Salon.

02.03 / NEW YORK LAW FAILS TO MAKE SHAREHOLDERS PAY EVEN WHEN THEY ARE LIABLE FOR WAGE THEFT

// Although shareholder liability for wage theft judgments is part of long-standing New York law, in practice, shareholders are rarely required to pay.

Workers experience particular difficulty collecting judgments when their employers are under-capitalized. Under current New York law, the 10 largest shareholders of non-publicly traded business corporations, and the 10 members of limited liability companies with the largest ownership interest, are each personally liable for any unpaid wages, debts or salaries if the corporation fails to satisfy a judgment awarded to employees.³⁹ However, the law currently contains so many hurdles that workers rarely can collect from shareholders even when the corporation cannot pay.⁴⁰

For instance, the law requires workers to give written notice to shareholders within 180 days of their last date of work, but provides no mechanism for an employee to learn the identity of shareholders within that time period.⁴¹ Even worse, employees cannot initiate any legal action against the shareholders unless they have spent years to obtain a judgment against the corporation, and the corporation has then failed to pay. By that time—often two to three years of litigation having already occurred—the individual shareholders are likely to have hidden assets. The employees must then litigate a second successive lawsuit against them, having already prevailed against the corporation without getting paid. Low-wage workers cannot afford to pay attorneys to file successive lawsuits, and attorneys are unlikely to spend years in court pursuing these claims given the ease with which shareholders can dispose of assets.

Although shareholder liability for wage theft judgments is part of long-standing New York law, in practice, shareholders are rarely required to pay.

EXAMPLES

Shareholders Avoid Liability By Refusing to Disclose Identities: Yang v. Shanghai Café, Inc.⁴²

In 2010, six workers brought suit against Shanghai Café Inc. alleging that the well-known restaurant in Manhattan's Chinatown had violated minimum wage and overtime laws, and unlawfully retained tips earned by the wait-staff. The alleged violations were egregious, and the wage theft was estimated at close to \$460,000, not including penalties and interest. The corporation that employed the workers closed down and defaulted in the legal proceeding. The individual defendants who ran the restaurant also defaulted, except for one defendant who claimed not to have owned or operated the restaurant. None of the defendants ever disclosed the identity of all the corporate shareholders; thus, the workers were unable to serve all of the shareholders with notices within the 180-day deadline, as required by section 630 of the Business Corporation Law. The 180-day deadline and the lack of access to shareholder records meant that workers effectively had no remedy under this provision.

Restaurant Refuses to Reveal Top Shareholders: East Market Restaurant⁴³

Workers at East Market Restaurant, a popular banquet hall in the heart of Manhattan's Chinatown, sued the employer for failure to pay minimum wage and overtime. Many had worked there for years but did not know who the shareholders were. The employer repeatedly refused to identify the shareholders and when the attorneys sent notices for the shareholders to East Market's corporate address, some came back, unopened and marked as undeliverable. The workers' attorneys filed a motion with the court to compel the employer to provide information on the shareholders, but even then, the employer continued to deny knowledge of its shareholders. The law's requirement that the workers serve the shareholders in 180 days with no mechanism to learn the shareholders' identity was an insurmountable hurdle to shareholder liability in this case. The workers' case is still on going, but East Market recently closed, and without shareholder liability, it is possible these workers will not recover on a judgment.

SECTION 03 / EXPLOITATIVE EMPLOYERS SHIFT THE COST OF DOING BUSINESS TO WORKERS, LAW-ABIDING BUSINESSES, AND THE STATE

“I did this work during Christmas time hoping to earn money to buy gifts for my family and more importantly to pay for the most basic necessities—things we need to survive. . . . These employers are stealing bread from my children and many families.”

// Raimundo Calderon,
construction worker.

Wage-and-hour lawsuits around the country have surged.⁴⁴ However, because of the wage collection crisis, increased attempts to enforce the wage laws do not lead to increased compliance. Because of the gaps in New York law, too many employers who engage in wage theft know that even if they face a lawsuit, they will not have to pay their workers in full and perhaps not at all.

The Crisis Undermines State Laws

Even the remote possibility that a judgment will be difficult to collect drives down the amount of a settlement. Workers sometimes must settle for even less than they should have been paid in the first place. In this way, employers benefit from underpaying their workers and threatening to dissipate assets when faced with workers' claims. With so many workers going empty-handed even after winning a wage theft case, many decide not to pursue stolen wages at all. The collections problem undermines the New York Labor Law and the vicious cycle of wage theft continues unabated.

The Crisis Harms Individual Workers and Their Families

This under-enforcement of wage-and-hour law harms not just individual workers, but entire families. Low-wage individuals and their families already have to struggle to make ends meet, often without any benefits such as paid sick leave, a pension, or even health insurance. As described in one report, “[t]heir difficult lives are made immeasurably harder when they do the work they have been hired to do, but their employers refuse to pay, pay for some hours but not others, or fail to pay overtime premiums when employees' hours exceed 40 hours in a week.”⁴⁵ According to the U.S. Department of Labor, minimum wage violations alone lead to up to 25,600 families in New York living below the poverty line.⁴⁶

Unchecked wage theft does not only affect low-wage workers. Even employees receiving higher hourly wages fall victim to wage theft – and their employers may use evasive tactics to avoid paying: shutting down business, transferring assets, or threatening bankruptcy. Employers often use the same strategies against workers organizing and seeking union contracts. Until the law can hold these employers accountable, all workers' attempts to seek better working conditions are undermined.

The Crisis Hurts Law-Abiding Employers

When the law fails to hold exploitative employers accountable, law-abiding employers are also hurt. An employer who pays employees according to the law must charge more for its goods and services than the business next door that skims the workers' wages and pays workers less. When workers cannot enforce their rights against that business, the employer who follows the law pays the price.

The Crisis Limits New York's Economic Growth

The collections problem also limits the economic growth of New York State. When workers' wages are stolen and the judicial and law enforcement systems fail to help them collect, the workers lose purchasing power, the government wastes any expenditures invested in fighting wage theft, and our economy suffers as a result.

Unchecked wage theft cheats governments out of millions of dollars in tax revenue. Employers who underpay workers also underpay their share of income and employment taxes for workers' compensation and unemployment insurance.⁴⁷ As an example of the scope of the loss to the state, the DOL found that as a result of \$282.5 million in unreported wages due to employee misclassification, employers had failed to pay \$9.7 million in unemployment insurance in 2012.⁴⁸ In the construction industry alone, misclassified and off-the-book workers in New York costs the state \$271.6 million annually in lost payroll taxes for social security and Medicare, and social insurance premiums, such as workers' compensation and unemployment insurance.⁴⁹

In another cost to the state, workers who experience wage theft are often forced to turn to public assistance, such as food stamps and Medicaid. One study estimates that wage theft in the construction industry shifts approximately \$111 million in annual Medicaid costs to New York taxpayers. Another study found that minimum wage violations alone led to a \$2.8 million increase per month in the Supplemental Nutrition Assistance Program (SNAP), also known as food stamps.⁵⁰ Taxpayers thus inadvertently subsidize employers who steal from their workers.⁵¹ In effect, exploitative businesses have shifted the cost of doing business on to workers, other businesses, our government, and taxpayers.

***“We’re
filing liens
against the
employers
who are
really at the
bottom of
the barrel.”***

// Camilla Roberson,
Attorney at the
Public Justice
Center in Maryland.

SECTION 04 /
CONCLUSION
POLICY RECOMMENDATIONS

New York law must be updated to allow workers to collect wages stolen by employers. We thus propose the following changes, which will provide New Yorkers with crucial legal tools for collecting wages rightfully owed to them.

- 01/ Expand New York's mechanic's lien law to allow all workers the right to put a temporary lien on an employer's property when they have not been paid for their work.**
- 02/ Adopt Connecticut's attachment standard to allow workers with wage theft claims to temporarily hold an employer's property during litigation if the workers show a likelihood of success on their claims.**
- 03/ Amend New York Business Corporation Law and Limited Liability Company Law to help workers collect from shareholders and members who are already liable under existing law for unpaid wage judgments against corporations and companies.**

SECTION 05 / CITATIONS

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- ¹ Each year, in New York City alone, employers cheat low-wage workers out of more than a billion dollars in wages. Annette Bernhardt et al., *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City* (2010), 44, available at http://nelp.3cdn.net/990687e422dcf919d3_h6m6bf6ki.pdf.
- ² These cases were filed in state and federal courts, with judgments dated between 2007 and 2013, and involved claims under the New York Labor Law and/or the Fair Labor Standards Act.
- ³ While the 62 judgments were for a total of \$28 million, because \$263,000 had been paid to the workers at the time of the survey, the \$25 million reflects the amount that has been uncollected in the 62 cases.
- ⁴ New York State Department of Labor Data 2003-2013. Data obtained by the Urban Justice Center is available upon request.
- ⁵ *Id.*
- ⁶ N.Y. Lien Law § 3.
- ⁷ N.Y. Lien Law §§ 4, 10. A mechanic's lien will only attach to the amount that is owed by the owner to the general contractor; if the owner pays the full amount to the contractor, then the subcontractor cannot obtain a lien on the property. See *Peri Formwork Sys. Inc. v. Lumbermans Mut. Cas. Co.*, 975 N.Y.S.2d 422, 425-26 (App. Div. 2013).
- ⁸ Raimundo Calderon is a pseudonym. This worker was a member of Make the Road New York.
- ⁹ Santiago Torres is a pseudonym. This worker was a member of Make the Road New York.
- ¹⁰ *Sanchez v. Best Boat Seafood Rest. Inc.*, No. 11-cv-05558 (S.D.N.Y. July 30, 2013). Plaintiffs in this case are members of National Mobilization Against Sweatshops and represented by the Urban Justice Center and Patterson, Belknap, Webb & Tyler LLP.
- ¹¹ The Green Café workers were supported by the Tompkins County Workers' Center. Eliza LaJoie, "Green Cafe Owner Hit With \$1 Million Fine for Labor Violations," *The Cornell Daily Sun*, Sept. 7, 2010, available at <http://cornellsun.com/blog/2010/09/07/green-caf-owner-hit-with-1-million-fine-for-labor-violations/>.
- ¹² See *Moina*, No. PR 10-069, N.Y. Indus. Bd. of App. (July 26, 2013). Claimants in this case were represented by The Legal Aid Society.
- ¹³ See *Wu v. Glyphs Garden Inc.*, No. 12-cv-07995 (S.D.N.Y. decided May 20, 2013). Plaintiffs in this case are members of Chinese Staff and Workers Association and represented by the Urban Justice Center and Vladeck, Waldmen, Elias & Engelhard, P.C.
- ¹⁴ See *Alvarez v. Well-S Indus.*, No. 12-cv-08835 (S.D.N.Y. filed Dec. 5, 2012). Plaintiffs in this case are members of New Immigrant Community Empowerment and represented by the Urban Justice Center and the Kathryn O. Greenberg Immigration Justice Clinic at Cardozo Law School.
- ¹⁵ In addition to Maryland and Wisconsin, the following states have wage liens: Alaska Stat. § 34.35.440, § 34.35.445; Idaho Code Ann. § 45-620; Ind. Code § 32-28-12-1; N.H. Rev. Stat. Ann. § 275:51; Ohio Rev. Code Ann. § 1311.34; Tenn. Code Ann. § 66-13-101; Tex. Lab. Code Ann. § 61.081, § 61.0825, § 61.051; Wash. Rev. Code Ann. § 49.48.084, § 49.48.086.
- ¹⁶ For example, see California Assembly Bill No. 1164.
- ¹⁷ Md. Code Ann., Lab. & Empl. § 3-1101 *et seq.*
- ¹⁸ Maryland Department of Labor, Licensing and Regulation, Division of Labor and Industry, Maryland Lien for Unpaid Wages, available at <http://www.dlr.state.md.us/labor/wages/essunpaidwageslien.shtml>.
- ¹⁹ Telephone Interview with Camilla Roberson and Sally Dworak-Fisher, Public Justice Center (Dec. 22, 2014).
- ²⁰ *Id.*
- ²¹ Wis. Stat. Ann. § 109.09 *et seq.*
- ²² Eunice Cho et al., *Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers* (2013), available at http://nelp.3cdn.net/f6fc363a30266f0cd3_pzm6id1xa.pdf.
- ²³ See Wis. Stat. Ann. § 109.03(5) ("An employee who brings an action against an employer under this subsection shall have a lien upon all property of the employer...as described in § 109.09(2).").
- ²⁴ Wis. Stat. Ann. § 109.09.
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ Cho, *supra* note 22, at 17-18.
- ²⁸ *Id.* at 17-18.

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- ²⁹ *Id.*
- ³⁰ *Id.* at 2, 18.
- ³¹ New York law currently allows attachment of assets when “the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff’s favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.” N.Y. C.P.L.R. § 6201(3).
- ³² For example, state and federal law prevents judgment creditors from forcing someone to use certain money to pay a debt on a judgment such as social security benefits (42 U.S.C. § 407), workers compensation (N.Y. Work. Comp. § 313; 5 U.S.C. § 8130), unemployment assistance (N.Y. Labor § 595), and public assistance (N.Y. Soc. Serv. § 137).
- ³³ N.Y. C.P.L.R. § 6201(3).
- ³⁴ Conn. Gen. Stat. §§ 52-278c, 52-278d.
- ³⁵ See *Song v. 47 Old Country, Inc.*, No. 09 Civ. 5566 (E.D.N.Y. filed Dec. 21, 2009). Plaintiffs in this case are members of Chinese Staff and Workers Association and represented by The Legal Aid Society and Gibson, Dunn & Crutcher LLP.
- ³⁶ See *Song v. 47 Old Country, Inc.*, No. 09 Civ. 5566, 2011 WL 3846929 (E.D.N.Y. decided Aug. 30, 2011).
- ³⁷ See *Cao v. Wu Liang Ye Lexington Rest., Inc.*, No. 08 Civ. 03725 (S.D.N.Y. decided Oct. 27, 2010). Plaintiffs in this case are members of Chinese Staff and Workers’ Association and represented by the Asian American Legal Defense and Education Fund and Davis Polk and Wardwell LLP.
- ³⁸ David Noriega, “The Case of The Missing Wage Thief,” *BuzzFeed News*, Dec. 18, 2014, available at <http://www.buzzfeed.com/davidnoriega/the-case-of-the-missing-wage-thief#.hoNDXI18EI>.
- ³⁹ N.Y. Bus. Corp. Law § 630; N.Y. Ltd. Liab. Co. Law § 609.
- ⁴⁰ We use the term “shareholders” to refer to both shareholders of corporations and members of limited liability companies. We use the term “corporations” to refer to both corporations and limited liability companies.
- ⁴¹ *Id.*
- ⁴² See *Yang v. Shanghai Cafe Inc.*, No. 10 Civ. 08372 (S.D.N.Y. filed Nov. 5, 2010). Plaintiffs in this case are members Chinese Staff and Workers’ Association and represented by the Urban Justice Center and Kirkland & Ellis LLP.
- ⁴³ See *Cao v. East Market Rest., Inc.*, No. 13 Civ. 03902 (S.D.N.Y. filed June 7, 2013). Plaintiffs in this case are supported by Chinese Staff and Workers’ Association and represented by the Urban Justice Center and Lichten & Bright P.C. Some are also members of 318 Restaurant Workers Union. The Legal Aid Society represents the Union in related proceedings before the National Labor Relations Board.
- ⁴⁴ Christine Simmons, “Wage-and-Hour Lawsuits Surge in New York Federal Courts,” *New York Law Journal*, Apr. 30, 2013, available at <http://www.newyorklawjournal.com/id=1202598006707>.
- ⁴⁵ Brady Meixall et al, An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year (2014), available at <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds>.
- ⁴⁶ U.S. Department of Labor, The Social and Economic Effects of Wage Violations: Estimates for California and New York (2014), available at <http://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf>.
- ⁴⁷ Tim Judson et al, Cracking Down on Wage Theft: State Strategies for Protecting Workers and Recovering Revenues (2012).
- ⁴⁸ There are two categories of employee misclassification: Employers who misclassify their employees as independent contractors to avoid paying lawful wages and required taxes, or employers who pay their employees off-the-books to shirk tax obligations. The DOL report found misclassification violations in construction, restaurant, retail, car wash, automotive repair, wholesale food distributor, and entertainment industries. New York State Department of Labor, 2013, available at <http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2013.pdf>.
- ⁴⁹ Fiscal Policy Institute, Building Up New York, Tearing Down Job Quality (2007), available at http://www.fiscalpolicy.org/publications2007/FPI_BuildingUpNY_TearingDownJobQuality.pdf.
- ⁵⁰ U.S. Department of Labor, *supra* note 46.
- ⁵¹ A recent survey of retail workers showed that just over half made under \$10 an hour and 34% relied on public assistance. Stephanie Luce, Discounted Jobs: How Retailers Sell Workers Short (2012), available at http://retailactionproject.org/wp-content/uploads/2012/03/75_RAP+cover_lowres.pdf.

SECTION 06 / APPENDIX

EXPLANATION OF DATA COLLECTION METHODOLOGY

Quantitative Data:

A. Method 1: Problems Collecting Judgments

In order to identify wage theft cases in New York State in which workers had won judgments but had not been able to collect, we surveyed legal services organizations and private employment law firms. Legal service organizations were asked to identify cases where workers had won a judgment against their employers but were not yet successful in collecting the wages owed to them despite the court orders. Each organization was given the same instructions and case criteria in identifying cases with collection issues. From this survey, we were able to identify 62 cases with significant collection issues after a judgment was issued, including key pieces of information about each case, such as the date the case was filed, forum, case number, number of plaintiffs, industry, amount of judgment, date of judgment, and amount collected, if any. Using this information, we were able to verify the information provided by reviewing publicly filed documents in the respective courts' online filing systems and avoid any duplicative filings. The information for the 53 cases were provided by nine legal service organizations, including UJC, Legal Aid, NYLAG, AALDEF, MinKwon Center, MRNY, Workers Justice Center of New York, Empire Justice Center, and Safe Horizon.

The other nine cases were identified by eight attorneys in a similar but simpler poll conducted among plaintiff-side private employment firms, which were asked to identify a couple cases with collection issues.

While illustrative, the data from both legal service organizations and employment firms is limited due to various recordkeeping methods and other

limitations. For example, the data does not include all the cases where there have been collection issues nor does it account for the many cases that settle before there is a court-awarded judgment.

B. Method 2: New York Department of Labor Data

In October 2013, the Urban Justice Center obtained documents from the DOL through New York's Freedom of Information Law. The documents contained data showing the amounts that the DOL assessed and collected each year from 2003 to 2013. The data provided by DOL does not show on a yearly basis how much of that year's assessed wages were ultimately collected, or when. Rather, the data shows for each year, the total amount of wages that DOL assessed to be due, and the total amount of wages DOL collected. Wages assessed in one year may have been collected in a subsequent year. As such, we have aggregated the total amount assessed and collected over the ten-year period to determine the amount that was uncollected during the same ten-year period and to reduce the distortion from collection delays.

The underlying data is available upon request from the authors.

Qualitative Data:

We developed a survey and guidelines to conduct interviews with workers who had brought wage theft cases, prevailed, and had difficulty collecting on the judgment. Through informal inquiries, we identified lawyers and staff members of community organizations who volunteered to interview affected workers. The interview guide and survey are available upon request from the authors.

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